But they were not directed in that way. There was no mention of the circumstance that the killings were apparently without motive, there was no mention of the complete absence of rebutting medical evidence. They were not invited to consider the question of whether on studying the story of the appellant's acts they did not think that that story lent support to the medical evidence. They were only told that "being from this country" (the suggestion clearly being that the medical witness was not from this country although he had had long experience in it) and having "studied" the appellant for two days they were in a better position to judge as to the appellant's mental condition at the time of the killing than anybody else including the medical witness who had had him under observation for three months.

In the circumstances we were compelled to the conclusion that the appellant had been deprived of a chance of being acquitted which he would have had had the jury been adequately directed and we accordingly quashed the conviction.

That led us to consider what course we should take. We were of the opinion that a retrial would serve little useful purpose as on the evidence and bearing in mind the nature of the burden of proof that lay on the defence there could be little doubt as to the course the jury would have taken if adequately directed. We accordingly dealt with the case on the basis that the defence was made out.

Appeal allowed.

Solicitors: *Murphy & Dunbar.*

OOI YORK CHOO v. LIM SONG FOUNDRY

[O.C.J. (Hepworth J.) January 11, 1963]

[Penang — Civil Suit No. 259 of 1961]

Trespass — Licensee of accretion land trespassing on adjacent land — Condition in licence that licensee obtain permission from adjacent landowner — Permission not obtained — Whether adjacent landowner entitled to damages.

Land Laws — Trespass to land — Intentional interference — Damages — General or exceptional — Exemplary damages.

Damages — Trespass to land — Behaviour amounting to "contumelious disregard" of landowner's rights — Exemplary damages.

The plaintiff was the owner of a piece of land adjacent to the sea. Between the plaintiff's land and the sea there was a strip of accretion land about 100 feet by 100 feet belonging to the State. The defendants (who were contractors and boat builders) were the licensees of this accretion land and the conditions of the licence were that (a) the licensee should keep the land clean and that nothing permanent should be erected on it, and (b) the licensee should seek permission for his own access to the land. The plaintiff now sued the defendants for trespass for using the plaintiff's land as a means of access to and from the accretion land, for erecting a temporary shed and for knocking down a lavatory on the plaintiff's land.

Held: the defendants commenced to use the accretion land on or about October 10, 1961, and they for the purposes of using the accretion land used the plaintiff's land as a means of access with effect from that date. Further at no time prior to October 19, 1961 did the defendants make any attempt to obtain the plaintiff's permission. Thus the defendants trespassed on the plaintiff's land continuously from about October 10, 1961 to about October 20, 1961;

(2) the defendants' behaviour amounted to a wanton intentional interference and a "contumelious disregard of the plaintiff's rights". The plaintiff was entitled to exemplary damages of $3,500 and costs.

CIVIL SUIT.

Jag-Jit Singh for the plaintiff.

Lim Cheng Poh for the defendants.

Cur. Adv. Vult.

Hepworth J.: The plaintiff is the owner of a piece of land known as Lot 662, Mukim 14, Province Wellesley North. The defendants are contractors and boat builders and have their place of business at 2698, Bagan Luar Road, Butterworth, Province Wellesley. The plaintiff's claim is for damages for trespass by the defendants on the said land, Lot 662. (A prayer for an injunction was abandoned as now being unnecessary).

Lot 662, which has an area of over 4 acres, is adjacent to the sea. Between Lot 662 and the sea-shore there is an area approximately 100 feet long by 100 feet wide of what is known as accretion land, that is to say land which was formerly covered by the sea. It is common ground that this accretion land is State land.

On the 7th October, 1961, the defendants applied to the Collector of Land Revenue, Butterworth, for permission to erect a temporary shed and to construct tongkangs on this accretion land. On the 10th October, 1961, the Deputy Collector of Land Revenue, Butterworth, replied to the defendants informing them that their application was approved, subject to two conditions, (a) that the licensee should keep the land clean and that nothing permanent should be erected on it, and (b) that the licensee should seek permission for his own access to the land.

It was the plaintiff's case that the defendants had trespassed on the said Lot 662 in three ways:—

(1) By using the said land as a means of access for the purpose of getting to and from the accretion land;

(2) by erecting the temporary shed on the plaintiff's land and not on the accretion land; and

(3) by knocking down a lavatory which had been on the plaintiff's land and building a new lavatory a short distance away.

The defendants denied that they had ever trespassed on any of the plaintiff's land, saying that the temporary structure and the lavatory were built on the accretion land and that the vehicles had obtained access to the accretion land on a route other than the one which ran through the plaintiff's land.

There was some doubt as to the exact location of the temporary structure and the

lavatory and I do not think that the plaintiff has discharged the onus upon her of proving that they were erected on her land. The question, however, of using the plaintiff's land as a means of access to the accretion land is a very different matter.

The plaintiff gave evidence that her land was used as a means of access by workmen and motor vehicles. The vehicles she said brought in building materials, steel plates, steel works and motor equipment for the construction of steel lighters. This was confirmed by three witnesses, one of whom was a completely independent witness who lived across the road from the plaintiff's land and could see the plaintiff's land from his house. The plaintiff gave her evidence in a straightforward manner and I have formed the opinion that she was a witness of truth.

The proprietor of the defendant firm, one Lim Tong Sam (D.W.1), impressed me as a witness who was as untruthful as the plaintiff was truthful. He alleged that before the 19th October, 1961, he had not made use of the land, that is to say the accretion land. He also stated that he had first started taking goods to the site on or about the 28th October, 1961. When pressed on these points he became extremely vague and evasive. If what D.W.1 said was true the contents of the letter written by the plaintiff to the District Officer, Butterworth, on the 17th October, 1961, (page 3 of bundle "A") complaining that there had been trespassers on her land must have been invented by her. The Deputy Collector of Land Revenue, Butterworth, who was called as a witness by the defendants (D.W. 2) said that he went on to the accretion land one or two days after the receipt of the plaintiff's letter of the 17th October, 1961. That must have been the 20th at the latest. There he found that the temporary shed had already been erected and that on the site there were such things as oxygen cylinders, motor equipment, tools and implements, all of which were things which had been referred to by the plaintiff in her letter to the District Officer, Butterworth, of the 17th October, 1961. Furthermore it is clear from the defendants' application for permission to use the accretion land that they were in a hurry to start work there, their letter of application stating that they intended to commence the erection of the temporary shed on the 9th October, 1961. I am entirely satisfied that no reliance whatever can be placed on the evidence of D.W.1.

I find as a fact therefore:—

(a) that the defendants commenced to use the accretion land on or about the 10th October, 1961, for the purpose of building a temporary shed and for the construction of tongkangs;

(b) that for the purpose of so using the accretion land they used the plaintiff's land as a means of access with effect from that date; and

(c) that at no time prior to the 19th October, 1961, did the defendants make any attempt to obtain the plaintiff's permission.

It was not until representations were made by the plaintiff to the District Officer, Butterworth, and as a consequence the Deputy Collector of Land Revenue, Butterworth, arranged a meeting between the plaintiff and D.W.1 that any attempt was made by the defendants to get approval from anyone for access to the accretion land. So that I hold that the defendants trespassed on the plaintiff's land continuously from about the 10th October to about the 20th October, 1961. The plaintiff is therefore entitled to succeed.

Generally damages are directed to the compensation of the plaintiff for the harm done to her; exceptionally they may look also to the punishment of the defendant. Such damages are variously called punitive damages, vindictive damages, exemplary damages, and even retributory damages. They can apply only where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights. The torts where exemplary damages are most likely to feature are those which affect the person rather than those which affect property, since, outside personal injury, the former generally require intentional, even malicious, conduct on the part of the tortfeasor. Beyond this, however, the Courts have allowed exemplary damages in torts which affect property, where there has been a wanton intentional interference by the defendant. (*Mayne and McGregor on Damages*, 12th edition, paragraphs 207 and 208).

Mr. Jag-Jit Singh has submitted that this is an appropriate case for the award of exemplary damages and it is necessary therefore to consider in some detail the conduct of the defendants. Trespass is actionable *per se* and it is therefore not necessary for the plaintiff to prove special damage.

The defendants' attention was specifically drawn by the Deputy Collector of Land Revenue, Butterworth, in his memorandum of the 10th October, 1961, (page 2 of bundle "A") to the necessity of their seeking permission for their own access to the accretion land. In addition both the plaintiff and her sister, P.W.4, told the people trespassing not to do so, but no notice was taken of their objections. The plaintiff also telephoned to the defendants and complained and was told: "Oh, you are the proprietress, you do not know how to do business." No attempt was made to obtain permission until the 19th October, 1961, and then only on the intervention of the Deputy Collector of Land Revenue. When the plaintiff's solicitor wrote to the defendants on the 25th October, 1961, calling upon them to cease trespassing on the plaintiff's land, the defendants did not bother to reply.

I can think of no better description of the defendants' behaviour than that contained in *Mayne and McGregor* on Damages to which I have referred above of acts "in contumelious disregard of the plaintiff's rights". It seems to me that there has been a wanton intentional interference by the defendants, and that accordingly the plaintiff is entitled to exemplary damages.

There will be judgment for the plaintiff for $3,500 and costs.

Judgment for the plaintiff.

Solicitors: *Jag-Jit Singh; Pillai, Lim, Lee & Hwang.*

SEMENANJONG TRADING CO. v. TEOH CHENG HOCK

[O.C.J. (Hepworth J.) January 11, 1963]

[Penang — Summons-in-Chambers No. 259 of 1962 in Civil Suit No. 300 of 1962]

Practice and Procedure — Statement of claim — Application by summons-in-chambers to strike out — Matter adjourned into open court for argument — Whether application properly brought under R.S.C., O.25 r.4.

Carriage of Goods by Sea — Cargo jettisoned during voyage — Agent of owner and consignee delivering other cargo to consigners without exercising lien of general average contribution — Damage suffered by owner of jettisoned goods.

The plaintiffs were the owners and the consignees of 105 bags of native tea dust which were shipped at Sumatra in motor vessel "Tiong An" of which the defendants were the agents under bills of lading dated November 22, 1960 for Penang. During this voyage from Sumatra to Penang the master of the vessel for purposes of saving the vessel and the rest of the cargo jettisoned the whole of the plaintiff's cargo and cargo belonging to two other consignees. There was incurred by the master of the ship general average sacrifices and expenditures as contained in the general average statement. On arrival of the motor vessel at Penang the defendant as such agent delivered the cargo remaining to the other consignees without obtaining from the said consignees the general average contribution due from them or any adequate security thereof and as a result the defendant had failed to exercise his lawful lien over the cargoes in respect of the contribution due to the plaintiffs and the plaintiffs had suffered damage thereby. The defendant made an application by summons-in-chambers under O.25 r.4 for an order that this statement of claim be struck out as disclosing no cause of action as it did not disclose whether the plaintiffs' claim was founded on contract or tort and even if it was based on contract how he could be liable even if the shipowner himself was.

Held: this application was properly made under O.25 r.4. The statement of claim could be amended so as to make it clear to the defendant what the case is that he has to answer and what the issue is that has to be tried.

Cases referred to:—

(1) *Scaife* v. *Tobin* (1832) 3 B. & Ad. 523.

(2) *Kemsley* v. *Foot* [1951] 2 K.B. 34.

(3) *Republic of Peru* v. *Peruvian Guana Co.* 36 Ch. D. 496.

SUMMONS-IN-CHAMBERS ADJOURNED INTO OPEN COURT.

A. P. Godwin (*Chang Min Tat* with him) for the plaintiff-respondent.

J. E. Lloyd (*Eugene Khoo* with him) for the defendant-applicant.

Hepworth J.: This is an application by the defendant by summons-in-chambers under Order 25 rule 4 for an order that the statement of claim be struck out as disclosing no cause of action. This summons has been adjourned into open court for argument.

When considering whether a statement of claim discloses a cause of action the statement of claim alone should be considered and all the allegations in it should be assumed to be true. It is assumed that the plaintiff can prove everything alleged in the statement of claim but that even then there is no case to answer.

The statement of claim discloses that the plaintiff was the owner and the consignee of a parcel of 105 bags of native tea dust which was shipped at Kuala Langsa, Sumatra, in motor vessel "Tiong An" of which the defendant was the agent under bills of lading dated the 22nd November, 1960, for Penang. During the voyage from Kuala Langsa to Penang the master of the said ship made and incurred general average sacrifices and expenditures, particulars whereof were contained in a general average statement. This general average statement showed that the plaintiff was entitled to general average contribution in respect of his goods amounting to $11,021.18.

In addition to the plaintiff's cargo other cargo was also consigned for four other consignees. By reason of running into a strong gale the master of the said motor vessel for the purpose of saving the said motor vessel and the rest of the cargo jettisoned the whole of the plaintiff's cargo and a portion of the cargo belonging to two of the other consignees.

On the arrival of the said motor vessel at Penang the defendant as such agent delivered the cargo remaining unjettisoned to the other four consignees. The defendant did so without obtaining from the said consignees the general average contributions due from them or any or any adequate security therefor.

The plaintiff contended that the defendant had in making this delivery failed to exercise his lawful lien over the said cargoes in respect of the contribution due, *inter alia*, to the plaintiff. The plaintiff contended that the defendant was thereby in breach of his duty to the plaintiff by failing to claim the said contribution from the other consignees as aforesaid and that as a result the defendant had deprived the plaintiff of his general average contribution.

In the alternative the plaintiff contended that by not obtaining as in duty bound from